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THE LAW OF WAR AND THE OPERATIONAL COMMANDER

by

Major F. Glenn Richardson, USA

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Joint Maritime Operations Department.

The contents of this paper reflect my own personal views and are not necessarily by the Naval War College, the Department of the Navy, or the Department of the Army.

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ABSTRACT OF THE LAW OF WAR AND THE OPERATIONAL COMMANDER

All is not fair in love and war. Every member of the military is bound by oath to discharge his or her duties in accordance with the law of war. This paper examines the influence of the law of war on the operational commander and includes legal planning considerations for campaigns. It does not list all laws of armed conflict or the provisions of applicable conventions concerning warfare. Operational law, based on the principles of military necessity, unnecessary suffering, and proportionality enables the operational commander to plan and execute legal, successful operations. Command criminal responsibility assumes an operational commander does not issue illegal orders or in some way personally directs or supervises a prohibited activity. Selected cases in military history clearly indicate that operational commanders who have adhered to the law of war emerged victorious in their respective campaigns. Analysis of these cases and current law supports the premise that the operational commander must obey the law of war, and has no authority to violate or selectively enforce the law. To ensure operations are conducted within the spirit and intent of the law of war, training programs need to be instituted at all levels of professional military education.

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PREFACE

I initiated this study with the idea that there may be some cases where an operational level commander could justifiably break the law. Indeed, this was my thesis. Accordingly, my antithesis was that there are no cases where an operational level commander can break the law.

Unskilled as I was at legal research, but nevertheless interested in the topic, I pursued a test of my thesis similar to statistical tests. After reviewing many cases, looking at various laws and treaties, and interviewing those who know much more about the subject than me, I found my antithesis to be valid.

Perhaps, for some, this comes as no surprise. But for me, I had to explore the possibility. What I discovered was that all is not fair in love and war. Well, at least in war... .

I would like to express my appreciation to Colonel Tom Lujan of the Army's Judge Advocate General's Corps for his invaluable assistance and his continued friendship. After spending time together in paradise - in the U.S. Army Special Operations Command at Fort Bragg, North Carolina - we now find ourselves having to pay our proverbial dues with Washington tours. At least I was able to delay my arrival by spending a year here at the Naval War College.

I also thank Lieutenant Colonel John Smith, also of the Army's Judge Advocate General's Corps, for his timely and interesting information regarding his experience in Somalia with the 10th Mountain Division (Light). His experience should become the cornerstone for operational law training as the military continues to engage in operations other than war.

Regarding any mistakes the reader may find in either form or substance, I take full responsibility.

Glenn Richardson
Newport, Rhode Island
February 1994

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INTRODUCTION

The United States of America enjoys a system of law based on superior ethical and moral principles. The authority of those who serve the government is strictly regulated by the law, and the military is no exception. In spite of this fundamental tenet, it is occasionally suggested that military necessity should pre-empt the law. This is blatantly wrong.

Military leaders are not only subject to domestic law, but are also responsible for ensuring they comply with the law of war. This paper examines the law of war and its applicability to the operational level commander. Included in the term "law of war" are the generally accepted principles of engagement in armed conflict; the Law(s) of Naval, Land, and Air Warfare; the less clearly defined international law; and, the provisions of the Geneva and Hague Conventions. The law of war includes law that governs the decision to go to war and that governing the conducts of combatants: this paper focuses on the latter body.

It is not the intent of this paper to define the various laws or list provisions, sections, or protocols. Instead, it is to survey law as it applies to the operational commander and support the contention that the operational commander does not possess the authority to violate the law of war. This is the primary purpose of the first section of the paper, The Law of War.

Operational Law is the title of the second section, which is a term recently introduced in military legal lexicon and applies

to a type of law that directly affects the operational commander. This section also explains the critical link that must exist between the operational commander and his principal legal advisor, the Staff Judge Advocate.

An operational commander must be acutely aware of Command Criminal Responsibility, which is discussed in the third section. Command criminal responsibility goes far beyond felonious acts - it assumes that a commander does not issue illegal orders or in some way personally directs or supervises a prohibited activity.

Case Studies are presented in the fourth section of the paper which illustrate conditions of both lawlessness and adherence to the law of war and the resulting effects on the success or failure of military operations. Included among the cases are recent considerations and observations from Operation Restore Hope.

The fifth section presents Analysis and Conclusions based on research, interviews, legal case analysis, and historical reviews. This section articulates that operational commanders must adhere to the law of war, and that such adherence does not constrain the operation.

Recommendations in the final section are made with the intent to not only ensure that present day operational commanders conduct operations in accordance with the law of war, but that our future leaders will never violate their obligation to obey the law of war.

THE LAW OF WAR

An understanding of the law of war necessitates an understanding of "war" itself. It is the phenomenon of war which these laws attempt, in some manner, to control.¹ The Oxford English Dictionary (1933) contains a definition of war which has three elements. War is defined as (1) a hostile contention; (2) by means of armed forces; (3) carried on between states.

The ultimate sanction in international relations is war. War is a political instrument, not always undertaken to destroy, but to deprive the target state of the ability and will to continue to violate normal behavior. The threat of war, then, may deter states from aberrant behavior, and the use of war as a response to prior actions is punitive. But in either case, the major intention of a state undertaking responsive warfare is to force political submission.²

It seems strange to suggest that law might be one of the factors which maintain the institution of war. Law is the very antithesis of war. To many commentators - ranging from Clausewitz to the most dedicated pacifists - the idea that there might be laws relating to the conduct of war is an absurdity.³ Military necessities appear to diametrically oppose the laws of humanity. The military necessity concept can be greatly - and

¹ DA Pam 27-161-2, International Law, Volume II, p.1.

² Walter S. Jones, The Logic of International Relations, 5th ed., pp. 496-497.

³ Christopher Greenwood, "In Defence of the Laws of War," p. 133.

improperly - expanded to imply that any act or measure that influences the course of hostilities in favor of one of the belligerent, either immediately or in the future, may be justified on that account.⁴ Indeed, there is a clear dichotomy, as the laws of armed conflict are a tug-of-war between two contradictory forces: the need for an ethical standard of civilization, and the requirements of war itself.⁵

Having identified the paradigm, an operational commander - and a nation's leadership - have to query why obey the law of war? What's in it for us? Wouldn't we be better off if we just didn't follow the law? Wouldn't it be better if we just made and enforced our own laws? Clearly, in a country such as the United States, we possess the power - and military might - to make our own rules.

The main reason for compliance with the law is that compliance is the "right" and ethical thing to do. In fact, it is the duty of every uniformed American to comply with the law. Among other reasons, we expect compliance from our adversaries. Violations of the law of war disrupt, and potentially inflame, public opinion. Even in the face of enemy violations, our compliance with law leaves us in good favor with the rest of the international community, and enables us to coalesce support and build coalitions. And, among the most important reasons to

⁴ Report of the Conference on Contemporary Problems of the Law of Armed Conflicts, Carnegie Endowment for International Peace, New York, 1971, p. 15.

⁵ Ibid., p. 14.

comply with the law of war is the possible - and positive - effect such compliance may have on war termination objectives. NWP-9, The Commander's Handbook on the Law of Naval Operations, succinctly states:

Nations adhere to the law of war not only because they are legally obligated to do so but for the very practical reason that it is in the best interest of belligerents to be governed by consistent and mutually acceptable rules of conduct.⁶

There are, however, instances in our history where a commander has violated the law. But, the deliberate decision to violate should never be made at the operational commander's level. Here, it is important to distinguish between the authority of the President and the operational commander. Much has been written about whether the President has the authority to violate international law. Although the answer to that question may not be clear, it is at least arguable that he has such authority. The President undoubtedly has a great deal of discretion in interpreting and deciding issues under international law. The military commander, on the other hand, has much more limited discretion in interpreting international law and has absolutely no authority to violate it.⁷ During Operation Desert Storm, the Bush administration's battle to ensure that international law was consistent with our national

⁶ NWP-9, p. 6-1.

⁷ DoD Dir 5100.77 states, "... (DoD policy is to ensure that) the law of war and the obligations of the U.S. Government under that law are observed and enforced by the U.S. Armed Forces."

security interests was not authority for military commanders to violate the law. The military commander may not subordinate the law to his operational objective.⁸

OPERATIONAL LAW

Commanders should be counseled, chiefly, by persons of known talent; by those who have made the art of war their particular study, and whose knowledge is derived from experience; from those who are present at the scene of action, who see the country, who see the enemy; who see the advantages that occasions offer, and who, like people embarked in the same ship, are sharers of the danger.

- Lucius Paulus, Roman Counsel
Macedonia, 168 B.C.

Operational law is that body of domestic, foreign, and international laws, regulations, and policies that impact specifically upon the military operations of U.S. forces in combat and peacetime engagement.⁹ It has evolved through the amalgamation of laws promulgated by treaties, generally accepted laws of armed conflict, and the more nebulous international law.

Operational law covers military forces deployed in six types of situations: U.S. forces deployed overseas under a peace time stationing arrangement; deployments for conventional combat missions; security assistance missions; overseas exercises; nonconventional missions; and, humanitarian operations.

Military lawyers who support operational commanders apply operational law in all campaign plans and concepts of operations

⁸ CAPT Matthew E. Winter, USA, "Finding the Law - the Values, Identity, and Function of the International Law Adviser," Military Law Review - Vol 128, Spring 1990, p. 25.

⁹ Army Command and Management (ACAM) 1992-1993, p. 25-16.

to specifically tell the operational commander how he can conduct his operations and what he cannot legally do.¹⁰ One of the military lawyer's key contributions to a campaign will be in the development of Rules of Engagement (ROE). At a minimum, the operational commander's legal advisor should ensure the ROE address the right of self-defense; hostile forces, acts, and intent; use of chemical munitions, to include riot control agents; use of nuclear munitions; use of booby traps; air defense artillery weapons status; employment of mines and minefields, electronic warfare assets, indirect fires and observers; employment of special operations forces; and, transition ROE (threat/peace to hostilities).¹¹

Like the law of war, operational law is based on three general principles of armed conflict, the first being military necessity. Here, the operational commander must delineate actions indispensable for securing the complete submission of the enemy in the shortest period of time. Secondly is the concept of unnecessary suffering, and the overriding consideration that military necessity does not allow the commander to employ arms, projectiles, or other weapons designed to cause unnecessary

¹⁰ Interview with COL Thomas R. Lujan, USA, 14 Jan 94. Colonel Lujan, a Judge Advocate General's Corps officer with extensive experience in special operations, currently serves in Falls Church, VA.

¹¹ ACAM, p. 25-19.

suffering.¹² Finally, the principle of proportionality dictates that the loss of life or property must not be out of proportion with the military advantage gained.

Operational commanders must be aware of the operational law issues that will affect their plans, training, and the conduct of operations. In conflicts, the legal and political aspects of operations often overshadow the military aspects. In the heat of battle it is too late to ensure that troops know how to apply operational law.¹³

COMMAND CRIMINAL RESPONSIBILITY

"War is very simple, direct, and ruthless. It takes a simple, direct, and ruthless man to wage war."

-- General George Patton

"All is fair in love and war."

-- F.E. Smedley

Instilling the aggressive spirit in one's troops is always necessary, but never entirely successful. Some commanders have preached "kill or be killed," and some have embellished that edict with a command to "make their arms and legs fly." Bosun's mate O'Donnell admired Admiral "Bull" Halsey for emblazoning a

¹² This is the rationale for the prohibition of glass projectiles by the Geneva Convention, as glass shrapnel is hard (and in some cases impossible) to detect with conventional X-rays.

¹³ MAJ Philip E. Lower, USA, "Operational Law: A Commander's Responsibility," Military Review, September 1987, p. 25.

South Pacific harborside with an enormous lighted sign: "Kill Japs. Kill Japs. Kill all the Lousy Bastards." ¹⁴

Fortunately for the citizen, but unfortunately for the operational commander, there are as many demands for restraining him as there are for unleashing him on the enemy. From the start, Western man has shown concern that his wars be justified morally, and that his warriors know and observe certain rules concerning the extent of violence they perpetrate.

Command criminal responsibility goes far beyond felonious acts - it assumes that a commander does not issue illegal orders or in some way personally directs or supervises a prohibited activity. According to NWP-9:

Officers in command are not only responsible for ensuring that they conduct all combat operations in accordance with the laws of armed conflict; they are also responsible for the conduct of their subordinates.¹⁵

It should be noted that command criminal responsibility requires a commander's personal knowledge, involvement, connection, or intent. When this is viewed in the context of an operational commander's level of responsibility, the varying-shades-of-grey concept of "should have known" enters the arena. In Army Field Manual 27-10, a paragraph entitled "Responsibility for Acts of Subordinates in the Law of Land Warfare" states:

The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have

¹⁴ Roger H. Nye, The Challenge of Command, p. 83.

¹⁵ NWP-9, p. 6-2.

committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violator thereof.¹⁶

An amplification of the words "should have knowledge" would have prevented much legal difficulty and would have eliminated many attacks on the apparently "flawed" instructions of the court which supposedly were a part of a conspiracy by the Army to whitewash the My Lai incident by propounding different standards for itself than it required of conquered foes after World War II.¹⁷ The real irony is that this "should have known" standard was considered too broad and one that would subject the commander to arbitrary after-the-fact judgements concerning what he should have known by the international community. As Colonel William G. Eckhardt writes,

If one were to apply to Dean Rusk, Robert McNamara, McGeorge Bundy, Walt Rostow, and General William Westmoreland the same standards that were applied in the trial of General Tomoyuki Yamashita there would be a very strong possibility that they would come to the same end as he did.¹⁸

¹⁶ FM 27-10, p. 128.

¹⁷ T. Taylor, "The Curse of Military Justice," New York Times, February 2, 1972, p. 37.

¹⁸ Colonel William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," Military Law Review, Vol. 97, 1982, p. 49.

CASE STUDIES

"War will never be abolished by people who are ignorant of war."

-- Walter Lippman

It is important to examine cases in our military history where conditions of both lawlessness and adherence to the law of war have resulted in operational failure or success. The first case involves the American Civil War, and the contrasting campaigns and conduct of Generals R.E. Lee and W.T. Sherman. This will be followed by a brief look at the results of trials for war crimes committed during the Second World War. A brief analysis of Operation Desert Storm brings the cases to the present day. And finally, Operation Restore Hope in Somalia will be examined from a unique perspective of deploying forces to a country with neither laws nor legitimate government.

THE AMERICAN CIVIL WAR

"Lee is the only man I know whom I would follow blindfolded."

-- General Stonewall Jackson

Apart from being the most enduring conflict in the nation's psyche, the American Civil War brought into focus the extraordinary genius of General Robert E. Lee.¹⁹ General Lee was a superb officer, an unparalleled commander, and, most importantly, a true Southern gentleman who strictly adhered to

¹⁹ MAJ Jeffrey F. Addicott, "Operation Desert Storm: R.E. Lee or W.T. Sherman," Military Law Review, Vol 136, Spring 1992, p. 119.

and enforced humane and legal war prosecution. On both of his campaigns into the North, Lee conducted his army impeccably, punishing all soldiers convicted for larceny of private property.²⁰ Fully realizing that Union forces razed civilian homes and farms in the Shenandoah valley, and committed multiple atrocities in the burning of Southern population centers of Charleston, Atlanta, and Savannah (and almost everything in between), Lee still insisted on strict obedience to law. Lee wrote:

No greater disgrace can befall the army and through it our whole people, than the perpetration of barbarous outrages upon the innocent and defenseless. Such proceedings not only disgrace the perpetrators and all connected with them, but are subversive of the discipline and efficiency of the army, and destructive of the ends of our movement.²¹

Conversely, General Sherman is not remembered as a great military leader. He is generally credited with the flip assessment, "war is hell," and pursued a total war in the South at will. After burning the city of Atlanta to the ground, Sherman set out with over 62,000 Federal soldiers not to engage the Confederate Army, but to "make Georgia howl."²²

With Americans fighting Americans, Lee knew that the long term effects of engaging in reprisals would neither be profitable nor productive for Southern restoration. He was correct in his assessment, and his firm policy prohibiting reprisals

²⁰ Ibid., p. 130.

²¹ Edward J. Stackpole, They Met at Gettysburg, p. 30.

²² Addicott, p. 123.

immeasurably facilitated America's post-war healing. In contrast, Sherman's atrocities fueled hatred for generations of southerners, a hatred that is a common epitaph for those who commit war crimes.²³

WORLD WAR II

The atrocities in World War II continue to shock even the most casual readers of military history. Even today, society struggles to come to grips with the horrors of war crimes. A current popular motion picture, "Schindler's List," is the story of an SS officer who assists the escape of Jews from certain deaths in Nazi concentration camps. The Holocaust Museum in Washington DC attracts hundreds of visitors daily, all of whom are moved, if not physically disturbed, by the candid display of this dark period in history.

The legal lessons learned resulted from war crimes trials following the termination of the war. Although war crimes had been previously prosecuted, the Nuremburg trials became the most famous and are still used today to show the inadequacy and nonapplicability of selected defenses. For example, the defense of superior orders was held to be invalid, as Article 8 of the Nuremburg Charter provides that:

The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of

²³ Ibid., p. 132.

punishment if the Tribunal determine that justice so requires.²⁴

It is significant to note that the Nuremburg Charter is considered today as a correct statement of individual responsibility for war crimes.

Additionally, a superior may be held responsible for omitting to stop the atrocities committed by soldiers in his command. This was the major issue in the Yamashita Case where General Yamashita was convicted because he failed to take reasonable and proper measures to prevent the regular commission of war crimes by troops under his command.²⁵

DESERT STORM

Each member of this command who has knowledge of or receives a report of an apparent violation of the law of war (whether a grave breach or not) must report the incident to his immediate commander as soon as possible. If the facts and circumstances known to the individual member indicate that the immediate commander is or may be involved in the incident, the report should be made as soon as possible to the next higher command authority.

- Para 6.a., USCENTCOM Reg 27-25, "Reporting and Documentation of Alleged War Crimes," 9 Feb 91

Even in the face of gruesome Iraqi atrocities committed against Kuwaitis, the United States maintained adherence to the laws of war during Operation Desert Storm. General Norman Schwarzkopf, like General Lee 130 years before, attempted to minimize the evil aspects of war by protecting both combatants

²⁴ Dr. Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations, p. 55.

²⁵ Lecture by Professor Howard Levie, Adjunct Professor to the Naval War College, 2 February 1994.

and noncombatants from unnecessary suffering, safeguarding certain fundamental human rights of enemy prisoners of war, and facilitating the restoration of peace.

In today's setting, had General Schwartzkopf followed Sherman's example of "total war," not only would he be guilty of numerous war crimes, but also the armies he commanded and the nations he represented would have been subjected to the scorn and ridicule of the entire civilized world. In stark contrast to his opponent Saddam Hussein, General Schwartzkopf strictly adhered to both the spirit and the letter of all aspects of the law of armed conflict. With the wholesale looting, hostage-taking, murdering, torturing, raping, and environmental destruction directed toward Kuwait, Saddam Hussein carried Sherman's notion of "total war" to extremes.²⁶

Additionally, the American government - and the American people - would never tolerate abuses of the laws of war, particularly abuses that were command directed. The Bush Administration could be expected to take steps to immediately halt any violations of the law of war and promptly prosecute any Americans accused of war crimes.²⁷

It is not unreasonable to speculate that our success in building the coalition which emerged victorious in the Gulf was directly related to the adherence to the law of war and the insistence that our allies do the same. The glue which held the

²⁶ Addicott, p. 128.

²⁷ Ibid., p. 129.

coalition together was the overriding principle that violations of the law of war, Geneva or Hague conventions, and/or international or national law by one belligerent does not permit the other party reprisals. General Schwartzkopf related on numerous occasions that he hated war and all that it brought. However, he also pointed out that "once committed to war then (one should) be ferocious enough to do whatever is necessary to get it over with as quickly as possible in victory."²⁸ The difference between Schwartzkopf and Sherman was that Schwartzkopf directed his ferocity toward legitimate military targets, while Sherman illegally directed his ferocity toward innocent and helpless civilians.

OPERATION RESTORE HOPE

Operation Restore Hope, in Somalia, provided significant legal challenges to deploying forces. The operation was a joint and combined effort involving all services and coalition forces from 20 nations. During the operation, the U.S. was empowered by the United Nations to form, implement and command a Joint and Combined Task Force - later designated the Unified Task Force Somalia (UNITAF).²⁹

²⁸ Ibid., p. 133.

²⁹ Unpublished draft after action report for Operation Restore Hope by LTC John Smith, USA. LTC Smith deployed with the 10th Mountain Division (Light) from Fort Drum NY to Somalia from December 1992 until May 1993. He currently serves as the Staff Judge Advocate of the 10th Mountain Division.

Restore Hope was a test case for an operational commander to establish law and order in a country not only in chaos but also in anarchy. When our forces deployed, they found no local law upon which to base standards of conduct for the force itself.³⁰ In addition, except for Common Article 3 applicability to various clans, the Geneva Conventions, as a matter of policy as well as international law, could not apply.

However, the Geneva Conventions as well as Army Field Manual 27-10 delineate customary international law, and UN forces were subject to this law. This became the foundation for what the American Army forces would later call the International Law of Humanitarian Operations. Through this law, UN forces focused their limited resources to assisting Non-governmental Organizations and aid relief organizations. This was in synchronization with the operational commander's intent to direct an end state which included posturing the Somali people for their own "Somali solution."³¹

The operational commander also, in concert with his staff judge advocate, developed ROE to support the humanitarian relief operation. Key was the mandate to "use all necessary means" to ensure aid was delivered safely and securely.³² The commander

³⁰ Ibid.

³¹ Ibid.

³² All crew served weapons were considered to be threats to the security of the relief effort. Individual weapons may have been considered threats, which allowed commanders discretion in assessing the threat and engaging when hostile intent was displayed.

also promulgated legal responsibilities to the Somali people from the U.S. forces, which included medical care, claims for dislocating Somalis from their homes, and the health and welfare of detained persons. A command general order, distributed through command channels prior to deployment, prohibited the use of alcohol, non-prescription drugs including khat (a widely used Somali amphetamine) and the taking of "war trophies," specifically weapons.³³

Operation Restore Hope has provided significant lessons learned for adherence to law in operationa other than war (OOTW). In OOTW, the operational commander faces the challenge of a philosophical change in normal ROE implementation. In most combat operations, maximum force can be applied to a threat. In OOTW, commanders must employ the minimum force necessary to accomplish the mission. Deadly force is not the first option. Additionally, warning shots are a technique not often used in combat, but dictated (depending on the scenario) in OOTW. Finally, the operational commander has to implement ROE with "ruthless impartiality." During Operation Restore Hope, the operational commander took great pains to never single out a faction for specialized ROE treatment; instead, he emphasized the conduct of any faction as a basis for the use of force.³⁴

³³ This general order was modeled after USCENTCOM General Order #1 used during Operation Desert Storm.

³⁴ Smith.

ANALYSIS AND CONCLUSIONS

The law of war does not prevent us from fighting, nor does it hinder an operational commander's ability to conduct his mission. The law forbids only unnecessary suffering and destruction which do not confer a military advantage. Also, the law of war does not preclude a commander to attack a legitimate military target (except when the enemy has surrendered³⁵).

The law of war is often perceived to be a hinderance to combat operations. However, this perception is based on a fundamental misunderstanding of the law's purpose. With training, case study analysis, and experience (including experiences relayed by others), this misunderstanding can be overcome. Misconceptions frequently encountered by operational commanders include the use of 50-caliber machine guns or Vulcan weapon systems against troops "in the open." In actual fact, these weapons can be used legally, but it may not make sense. The principle of economy of force should dictate employment of weapons systems against selected targets, and economy of force restricts the use of certain weapons against troops.

³⁵ There is some ambiguity concerning the manifestation of an intent to surrender. Under the Law of Naval Warfare, when the unit surrenders, there must be a clean indication that it is, in fact, the unit who is surrendering, not just an individual. Under the Law of Land Warfare, a white flag displayed by an individual may signify only that the individual desires to surrender. The opposing force is not required to cease firing at other forces until it is reasonably certain the indication is a command or organizational indication (RADM Horace B. Robertson, Jr., USN (Ret), "The Obligation to Accept Surrender," Naval War College Review, Spring 1993, p. 111).

The United States is a nation of rule by law. Every member of the military is bound by oath to discharge his or her duties in accordance with the law, including the law of war.³⁶ Still, it is imperative to ask: are there conditions in which an operational commander can willingly violate the laws of war in the interest of security, expediency, or military necessity?

The answer to this question is an overwhelming no. The law of war is not a one-way street, imposing obligations on the attacker while absolving the defender of any responsibility for collateral civilian casualties. The law of war depends on both parties to a conflict adhering to agreed standards. The law of war acknowledges fog and friction, as exemplified by the law's recognition of collateral civilian casualties. What it prohibits is the intentional attack on a civilian population or upon individual civilians not taking part in the conflict, or the employment of weapons or tactics that result in excessive collateral civilian casualties.³⁷

As evidenced by the case studies, adherence to the law of war facilitate victory, enhance collective and individual morale, and create, for the operational commander, a command climate which fosters mutual respect and trust. On the other hand, ignorance of the law of war disables any chance of forming coalitions or building alliances and allows a general distrust of

³⁶ W. Hays Parks, "Rolling Thunder and the Law of War," Air University Review, Winter 1971, p. 3.

³⁷ Ibid., pp. 17-19.

command structure and a lack of discipline to permeate the organization.

The law of war also gives some element to predictability of campaign outcomes for the operational commander. As such, war termination objectives can be enhanced by strict adherence to the law. If we, as a civilized western nation and the key world superpower allow our military operations to be conducted without generally accepted norms for behavior, we will have degenerated to the level of uncivilized thuggery and will rapidly lose the esteem and confidence of the world community.

International law may also help to elaborate the national interest in a variety of operational settings. For example, international law has distilled from centuries of experience a substantial body of norms for the conduct of hostilities. Not to comply with these is to risk breakdowns in military discipline, brutalization of participants with resultant social costs on return to civilian life, unnecessary escalation or continuation of conflict, reciprocal mistreatment of nationals, domestic loss of support, and unnecessary destruction of human and material resources.³⁸

It is significant that the law of war does, in many cases, permit flexibility in their application. But this flexibility is normally for the convenience and exclusive exercise of the National Command Authority (NCA). Three examples come to mind to

³⁸ John Norton Moore, "Law and National Security," Foreign Affairs, January 1973, Vol 51, No 2, p. 416.

exemplify: the use of chemical weapons (specifically, riot control agents); special provisions for the U.S. Coast Guard to conduct its mission; and, laws governing the use of military forces in counterdrug operations.

The decision to employ riot control agents in warfare is normally withheld by the NCA. On occasion, the decision authority may be delegated to the unified commander-in-chief, but never to the operational level commander. However, in the interest of self defense and control, the operational commander may exercise decision authority in limited cases. The operational commander may employ riot control agents for the purpose for which they were specifically designed if lives are being threatened. An example of this employment would be to control rioting enemy prisoners of war or to protect convoys from civil disorder. However, in these limited cases the primary concern for the operational commander would be preventing the escalation from riot control agent usage to chemical warfare.

The U.S. Coast Guard is governed by certain laws - and exempt from others - which permit it to conduct its mission. The Posse Comitatus Act prohibits military services from executing federal, state, or local laws except "under circumstances explicitly authorized by the Constitution."³⁹ The Act does not

³⁹ The Posse Comitatus prohibition is not absolute. Congress has made a number of authorized exceptions whereby the President can order military involvement in otherwise prohibited activities. The most widely known exception has been the authority to enforce civil rights laws (Dale E. Brown, "Drugs on the Border: The Role of the Military," Parameters, Winter 1991-2, p. 57).

apply to the USCG. Two other federal statutes (14 USC 89 and 19 USC 1581(a)) permit USCG personnel to go on board vessels and make inquiries, inspections, searches, seizures, and arrests. This authority, along with the exemption from the provisions of Posse Comitatus, are granted to USCG personnel in their capacity as customs officers under the Department of the Treasury. Finally, the Mansfield Law (22 USC 2291(c)(1)) prohibited the "involvement of an officer or employee of the U.S. in any direct police action in any foreign country with respect to narcotics control efforts... ." However, an amendment to the law made an exception for maritime law enforcement.

Domestic law enforcement agencies have a great need for military equipment with counterdrug applications. Military organizations (for example, JTF-6) frequently provide this logistics support, along with requests for reconnaissance operations, ground surveillance radar and aerial reconnaissance operations, and intelligence analysis. Unlike the USCG, these operations are covered by Posse Comitatus and other restrictions. Although military support must meet legal scrutiny, the law of war does not restrict the military from providing essential resources to this enormous effort.

In conclusion, it would be naive to assume that American forces always operate in accordance with the laws of war. What we must continue to do is aggressively and immediately investigate reports of improprieties, and, if applicable, prosecute to the fullest extent of the law. In the course of

research, I discovered one commander who did, in fact, admit he would break the law for two (and only two) reasons: (1) to avoid the unnecessary loss of life; (2) to facilitate mission success. But, he would then immediately report his actions to legal authorities and make himself available for a full investigation.⁴⁰

RECOMMENDATIONS

Despite the importance of conducting military operations in strict adherence to the law of war, it is surprising to note how little training is actually conducted through professional military education programs. At the operational command level, flag officer training programs ensure that senior leadership is well grounded in the law of war and, specifically, operational law. However, at less senior and mid-career levels, training is not so complete, yet this is where such training is urgently needed as the success of an operational commander's mission or campaign will undoubtedly rest on the skills and knowledge of this target audience.

Unfortunately, and unjustifiably, there is resistance among some officers toward training in law. In his Arleigh Burke Essay Contest-First Honorable Mention award winning piece "Knowing the Law," Lieutenant Fredrick A. Graf, USN, illustrates the resistance to legal training among Naval officers:

⁴⁰ This operational level commander shall remain anonymous.

Most submarine officers are skeptical of the need for training in... law that applies to naval warfare. Their arguments generally follow one of three lines of reasoning: (1) Such training is not necessary since all U.S. naval officers already have developed the moral character and resolve to behave properly in time of war; (2) decisions dealing with international law are made only at very senior levels and the promulgated ROE will be complete and specific enough to regulate an officer's conduct... ; (3) the duty of American fighting men is to win wars for their country... consequently, adherence to an obsolete concept like... law in war is both foolish and disloyal.⁴¹

The Army probably provides more extensive legal training than the Navy. Army Lieutenant Colonel and Colonel level command selectees attend a compulsory Senior Officer Legal Orientation course as part of pre-command training. However, the Navy has no institutionalized legal training for command selectees. Even at the more junior grades, legal training is conducted by default or geographic proximity. For example, Naval officers attending the Surface Warfare Officers School (SWOS) receive legal training not because the Navy has included such training in the program of instruction and allocated appropriate resources to the school, but because of the proximity to the Naval Justice School and Operational Law Department of the Naval War College located at Newport.⁴² It is truly surprising that the Navy has such top notch technical training for its officers while giving them less than adequate training in law and ethics.

⁴¹ LT Fredrick A. Graf, USN, "Knowing the Law," Proceedings, June 1988, p. 58.

⁴² Interview with CAPT Ralph Thomas, USN, on 4 February 1994. CAPT Thomas is a member of the Operational Law faculty at the Naval War College.

The war college is another excellent opportunity to give the services' future leadership necessary training regarding professional conduct in war. However, the time allocated for instruction in legal issues is merely a small part of the Joint Maritime Operations trimester at the Naval War College. This appears in striking contrast to Admiral Luce's decree early in the century that every student at the Naval War College would have training in international law daily. The other war colleges - both at the intermediate and senior levels - have similar situations. What is indeed amazing is that the training in legal issues built into the current curriculum is significantly more that it was 10-15 years ago!⁴³

If we direct training in hopes of generating a better educated, better grounded corps of future operational commanders, there are still recommendations for our current operational commanders with regard to law. First, commanders must comply with ROE - they must know, understand, and enforce compliance with ROE. An operational commander must maintain not only command of his organization, but also control, to include control of his subordinate commanders. A practical, operational commander must have an open and productive dialogue with his idealistic legal advisors. Commander's should stress the conduct they expect in war; subordinates should instinctively know what is expected of them.⁴⁴

⁴³ Thomas.

⁴⁴ Eckhardt, p. 40.

In future operations, commanders should continue to take a hard, uncompromising, and impartial stand toward the commission of war crimes. Commanders should clearly communicate a comprehensive policy addressing the reporting and investigating procedures. Where applicable, war crimes should be prosecuted to both punish the perpetrator and to prevent recurrences.⁴⁵ As Eduard Shevardnadze so eloquently stated in an address to the UN General Assembly on 25 September 1990:

What we need... is to create as soon as possible a moral and legal environment in which anyone guilty of grave crimes against humanity, of participating in atrocities, in taking hostages, acts of terrorism or torture, and those guilty of particular ruthlessness in the use of force, could not escape punishment and would not be absolved from personal responsibility even if they acted under orders.⁴⁶

In the final analysis, the laws of war must be upheld and preserved. If operational commanders violate the law of war, and concede that in time of war anything and everything is permissible, the effect upon the capacity of persons generally to respond in accordance with the dictates of morality would be diminished rather than enhanced.⁴⁷

The cornerstone of military professionalism is professional conduct on the battlefield. Through Clausewitz's "fog" and "friction" of war, it is primarily through the operational

⁴⁵ Levie.

⁴⁶ Quoted by John Norton Moore, "War Crimes and the Rule of Law," Virginia Journal of International Law, Vol. 31, No. 3, Spring 1991, p. 415.

⁴⁷ Richard Wasserstrom, "The Laws of War," from War, Morality, and the Military Profession, Malkan M. Wakin, ed., p. 466.

commander that campaigns are planned, executed, fought, and won. One of the prices of being a world power is that American commanders - and American soldiers - are held to a higher standard of legal and ethical behavior on the battlefield. These standards, based on the law of war, reconcile military needs with the requirements of humanity.

The three sergeants were on one of the deepest backdoor recons the Green Berets would make: north of the Euphrates River, less than a hundred miles from Baghdad... . They had spent the night digging the hole for their "hide site," reinforcing it with prefabricated material. For weeks before the recon, Special Forces teams practiced digging the holes and living in them for days. Elaborate techniques were used to camouflage the tops and disguise any odors that might attract animals.

But the team could not escape an inquisitive child. As they peered out of their hole, an Iraqi girl no more than 7 years old walked by. The commandos held their breath. She stopped, stared for a moment at the small slit in the ground. Slowly, she lifted the lid and gazed wide-eyed at the three in their desert fatigues and camouflage paint. The three commandos quickly aimed their 9mm pistols, equipped with silencers, right at the girl's head. The girl could have easily been shot and dragged into the hole. The mission could continue.

"But we couldn't live with ourselves," said (a sergeant). She was spared.⁴⁸

⁴⁸ Douglas Waller, "Secret Warriors," Newsweek, June 17, 1991.

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